United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2215

In The

United States Court of Appeals

For The Second Circuit

NORI SINOTO,

Appellant,

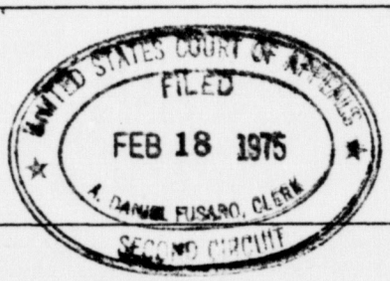
vs.

DEVCO MANAGEMENT, INC. and
DEIGHTON O. EDWARDS, JR.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANT



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The issues, the statement of the case, and the course of proceedings below are discussed in appellant's brief and are not repeated in this reply brief.*

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* An error appears at page 4 of appellant's initial brief; in line 3, the reference to the Appendix should be corrected to read "(128a; 141a)".

POINT I

IN APPELLEES' BRIEF CRITICAL FACTS ARE MISSTATED

At page 2 of their brief, appellees state that "It was understood by both parties that the Notes were only to be used as an accomodation and were not to be discounted, pledged or presented for payment". As pointed out in appellant's initial brief (p.7), this was not the understanding at all. Rather, Mr. Sinoto testified that the promissory notes here sued on (the "Notes") were, as stated on their face, valid and binding obligations of the maker and the guarantor; that they were given to support Mr. Edwards' promise to issue 50% of the common stock of Devco Management, Inc. ("Devco") to Mr. Sinoto; that they would be presented for payment if 50% of the stock was not so issued; and that prior to the maturity of the Notes, or earlier issuance of 50% of Devco's common stock, the Notes could be pledged to a bank as collateral for a loan to Mr. Sinoto (50a-53a, 122a-124a). Mr. Sinoto certainly did not testify that the Notes were intended to be valueless when given, nor did he admit any participation in Mr. Edwards' shocking theory that valueless notes were to be shown as "side collateral" to defraud a bank.

At page 3 of their brief, appellees make an

even more outrageous claim. They state that when Mr. Sinoto offered the Notes to Bankers Trust Co., as collateral, Mr. Edwards was telephoned for his consent, and that "No consent was given by Edwards". This is totally false. While the pages of the Appendix cited by appellees (122a-124a) are silent on this question, one page before Mr. Sinoto testified to the contrary. He stated that he telephoned Mr. Edwards from Mr. Oji's desk (at Bankers Trust) and Mr. Edwards said, "Of course, if Mr. Oji wants to do it, fine" (121a). This testimony was never controverted; indeed the district court found that "The notes--with such permission--were so displayed on at least one occasion but did not have the desired result" (141a).

The reason for this calculated misstatement is clear. In order to support Mr. Edwards' unsavory claim that valueless notes were given to defraud a bank, appellees must contend that Edwards did not consent to the attempted pledge of the Notes. The record shows, however, that Mr. Edwards <u>did</u> consent to the attempted pledge. This is most important for it demonstrates that at the time of the subject telephone call Mr. Edwards considered the Notes to be fully effective and valid. The attempted pledge of the Notes never was consummated only because Devco never opened its account with Bankers Trust (121a). Obviously

Bankers Trust intended to look to the Devco account for collection of the Notes which Mr. Sinoto sought to pledge.

Appellees state that "No evidence was offered by the plaintiff of a contribution either in cash or services to Devco other than a vague suggestion to Edwards...." (Appellees' brief, p.3). This statement is consistent with appellees' continuous, and erroneous, insistence that they have a "no consideration" defense to the Notes. The evidence is to the contrary, and the district court found specifically that consideration existed. Mr. Sinoto testified at length as to the services he had rendered for Devco and Mr. Edwards (33a-41a). Plaintiff's exhibit #5 is a letter to Mr. Sinoto signed by Mr. Edwards which states, "We are forwarding herewith four promissory notes, listed below, in consideration of your services rendered as executive advisor to Devco Management, Inc." (137a). Not only is this a true statement of fact; but also it is a binding and conclusive admission. At the conclusion of trial the judge stated his view, "not by way of decision", that:

> "It doesn't seem to me that the issue of consideration is very material. Obviously this plaintiff did some work for the group of people that ultimately emerged as Devco. And if the corporation--and the corporation got some benefit from it or could be deemed or could have thought it had benefit from it. And therefore if the corporation wanted to issue an--to pay for that benefit, I don't see that consideration is much in issue." (128a).

Finally, in its opinion the district court characterized the defenses (presumably including the insistent defense of no consideration) as "mostly irrelevant" (141a).

By repeatedly distorting the record, appellees are trying to give some substance to Mr. Edwards incredible claim that he gave valueless notes in order to defraud a bank.

POINT II

APPELLEES' BRIEF REEMPHASIZES THE ABSENCE OF A VALID DEFENSE TO THE NOTES

As is pointed out in appellants' initial brief (p.4), the defendants continually have insisted on two defenses to the Notes. These defenses were raised in the answer and voiced, although not proved, at trial. These alleged defenses are (1) lack of consideration, and (2) invalidity due to fraud, allegedly because the Notes were completed after signature and were not to be negotiated or presented (10a-11a, 14a-15a).

Defendants failed to prove either of these defenses. The district court's rejection of the lack of consideration defense is noted above. Similarly, the district court made short shrift of the claim that the Notes were incomplete when

executed by Mr. Edwards. In his remarks at the end of trial, the judge said:

> "I accept Mr. McNally's [an expert witness offered by plaintiff to show that the Notes had been completed prior to execution] testimony and therefore conclude that the Note when signed was in its present condition.
>
> However, that doesn't necessarily mean I believe Mr. Edwards was deliberately telling an untruth when he testified to the contrary. He may by this time have persuaded himself that that was the fact." (128a; Trial Transcript pp. 211-212).*

Despite the district court's rejection of these defenses, the major portion of appellees' brief is devoted to them. Cases are cited to support the proposition that failure of consideration is a proper defense to a note and that parol proof of such failure is admissible (pp. 4-8).

Thus, appellees' brief supports appellant's argument that the defense of "unconventionality" neither was pleaded nor proved, and does not constitute a valid defense. In short, appellees are unable to defend the district court's findings, and they therefore ignore them, falling back on rejected defenses.

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*Page 212 of the Trial Transcript was excluded from the Appendix because appellant deemed these remarks to be irrelevant in the absence of a cross-appeal from the district court's rejection of the lack of consideration and fraud defenses. However, appellees' brief again mentions these defenses.

CONCLUSION

The judgment must be reversed because defendants failed to sustain their burden of proof as to any defense. The defense of "unconventionality" suggested by the district court is invalid. A primary difficulty on this appeal is the ambiguity and incompleteness of the district court's findings of fact and conclusions of law (141a-142a). It is clear that the district court rejected the two defenses asserted by defendants. It also is clear that the court nevertheless found the Notes unenforceable. However, the manner in which it reached the latter conclusion and the factual basis for that conclusion are not stated. Rule 52 of the Federal Rules of Civil Procedure requires such a statement. Therefore, in the alternative, this action should be remanded. Lemelson v. Kellogg Co., 440 F.2d 986 (2d Cir. 1971); Fuchstadt v. U. S., 434 F.2d 367 (2d Cir. 1970); Klein v. Shields & Co., 470 F.2d 1344 (2d Cir. 1972); and Russo v. Central School District No.1, 469 F.2d 623 (2d Cir. 1972).

Respectfully submitted,

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Reply Brief

IS HEREBY ADMITTED. Thomas Trudell is

for Harris S. Edelstein

DATED: February 18, 1975

Attorney for Appellee